Illegal practices

The third ground advanced for setting aside the petitions focused on the allegation in the petitions that the Commission had actively pursued the policy inherent in s. 329A and had sought to implement it by warnings and otherwise although that section was invalid. It was submitted by Counsel for the Commission that, as s. 329A had not been declared invalid by any Court of competent jurisdiction, nothing done by the Commission by way of implementing that provision could amount to an illegal practice. I do not think it appropriate to rule on this submission. The provisions of the Act relating to the bases on which this Court may declare an election to be void on the ground of any illegal practice (s. 362) would require that, if I am to rule on the submission, I should construe other provisions of the Act and analyse with some precision the allegations contained in the petition. It may be that exercise would raise for determination the question whether the petitions comply with the requirements of par. (a) or par. (aa) of s. 355. The issues have not been fully explored in argument and perhaps such issues should not be fully explored in the absence of the members of the Parliament whose election the petitions seek to dispute.

In these circumstances, it is sufficient that I hold that Petition No. C9 of 1993 and Petition No. C10 of 1993 do not comply with the requirements of s. 355(c) of the Act and that, pursuant to s. 358 of that Act, no proceedings can be had on either petition.

I will hear further argument on the form of the order which must now be made.

(The parties considered that the appropriate order in each case would be to dismiss the petition under s. 360(1)(viii) with no order as to costs.)

I dismiss the petitions with no order as to costs.

REGINA

v.

NAILIE & ANOR.

HOUSE OF LORDS
LORD TEMPLEMAN, LORD LOWRY,
LORD BROWNE-WILKINSON,
LORD SLYNN OF HADLEY,
LORD WOOLF
26 MAY 1993

IMMIGRATION LAW: Charge under s. 25 Immigration Act 1971 - Offence of facilitating the illegal entry of persons into the United Kingdom - Whether offence proven - Appeal against acquittal of respondents by the Court of Appeal.

The first respondent had booked tickets for a group of Somalis relying on forged Tanzanian passports for that purpose. The group, upon interview by an immigration officer at Heathrow, claimed political asylum. The second respondent allowed the forgery of his wife's passport by the substitution for the original photograph, of a photograph of a woman and child and purchased airline tickets for three persons using the forged passport. During the flight, the second respondent took the passport back and upon disembarkation the three persons claimed political asylum. Both the respondents were found guilty and convicted by a jury of a charge under s. 25 of the Immigration Act 1971 (the Act).

Before the Court of Appeal it was not suggested that the travellers had practiced any deception and evidently they had not attempted to enter clandestinely. The Court of Appeal held that since there had been no attempt in either case by the other travellers to use forged passports, they could not have been illegal entrants and accordingly neither respondent could have facilitated the illegal entry of the persons concerned.

On further appeal, the Court of Appeal certified the following question of law of general public importance for determination:

> Whether a person seeking political asylum who disembarks from a ship or aircraft at a port in the United Kingdom without a valid passport or other document satisfactorily establishing his identity and nationality is on disembarkation an illegal entrant for the purposes of the Immigration Act 1971.

Held:

[1] When a prosecution is brought under s. 25 of the Act, the first question is whether the persons concerned are illegal entrants; the second is whether the accused knew or had resonable cause for believing them to be such; and the third whether the defendant was knowingly concerned in making or carrying out arrangements for securing or facilitating their entry into the United Kingdom.

[2] The pattern of the Act is that a person arriving in the United Kingdom by air must present himself to an immigration officer, and if so required, be examined, furnish information and produce a valid passport or other document. He can only enter lawfully if he is given leave. He is an illegal entrant if he comes in without such leave or in breach of the immigration laws by deceiving the immigration officer knowingly or otherwise.

[3] The critical feature of the present case is that none of the travellers sought to rely on false documents nor did they themselves practise any fraud or deception on the immigration officers nor did they enter clandestinely. The fact that they used forged documents to leave another country does not mean automatically that they practised deception to come into the United Kingdom. They all declared at once that they were seeking political asylum and they did not seek in any way to rely on the forged passports which in any event they no longer had in their possession.

[4] However desirable it may be to stop the trafficking in people and documents for the purpose of seeking entry into the United Kingdom, the Court of Appeal came quite clearly to the correct conclusion.

[Appeals dismissed with costs. Certified question answered in the negative]..

Cases referred to:

Reg v. Secretary of State for the Home Department, Ex parte Khawaja [1984] AC 74 ***(refd)***

Nadarajah Vilvarajah v. Secretary of State for the Home Department [1990] Imm. AR 457, 459-460 ***(refd)***

Legislation referred to:

Immigration Act 1971, ss. 3, 4, 11, 24, 25, 33, Sch. 2, 26

British Nationality Act 1981, s. 39(6), Sch. 4

JUDGMENT

Lord Templeman

My Lords,

For the reasons given by my noble and learned friend, Lord Slynn of Hadley I would dismiss both appeals and answer the certified question in the negative.

Lord Lowry

My Lords,

I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Slynn of Hadley. I agree with it and for the reasons which he gives I, too, would dismiss these appeals.

Lord Browne-Wilkinson

My Lords,

I have read the speech of my noble and learned friend Lord Slynn of Hadley. For the reasons which he gives, I too would dismiss both appeals.

Lord Slynn of Hadley

My Lords,

The Director of Public Prosecutions on behalf of the Crown Prosecution Service appeals against decisions of the Court of Appeal that Mr. Nailie and Mr. Kanesrajah (the first and second respondents) were not guilty of the offence of facilitating the illegal entry of persons into the United Kingdom contrary to s. 25 of the Immigration Act 1971. None of the persons involved was a patrial within the meaning of the Act. That section provides:

> (1) Any person knowingly concerned in making or carrying out arrangements for securing or facilitating the entry into the United Kingdom of anyone whom he knows or has reasonable cause for believing to be an illegal entrant shall be guilty of an offence, ...

The facts in the two cases are quite distinct; the issue, however, is similar. The two cases were heard together both in the Court of Appeal ([1992] 1 WLR 1099) and before your Lordships' House and the question of law of general public importance raised in each case was certified by the Court of Appeal to be:

> Whether a person seeking political asylum who disembarks from a ship or aircraft at a

port in the United Kingdom without a valid passport or other document satisfactorily establishing his identity and nationality is on disembarkation an illegal entrant for the purposes of the Immigration Act 1971.

The facts of the two cases in summary are these.

(i) *Mr. Nailie*

On 3 March 1991 two Somali women and six children arrived at London Heathrow from Kenya via Muscat. Their passports were taken from them by aircrew who handed the documents to an immigration official at Heathrow. The women on interview by an immigration officer claimed political asylum. Each was served with a "Notice to Illegal Entrant" under the Act of 1971 but granted temporary admission into the United Kingdom. The passports were forged Tanzanian passports.

Enquiries revealed that Mr. Nailie had booked tickets for the whole group, relying on the forged Tanzanian passports for that purpose, on 1 March 1991. There was evidence that he had looked after the checking in of the whole group in Nairobi and that on part of the flight the whole group travelled together though Mr. Nailie denied this.

The jury found him guilty of the offence charged and he was sentenced to eighteen months' imprisonment.

(ii) *Mr. Kanesrajah*

This respondent flew to Sri Lanka on 9 March 1991 taking with him his wife's passport. He allowed that passport to be forged by the substitution for the original photograph of a photograph of a woman and child. On 25 April 1991 airline tickets were purchased for the respondent and three persons who were to travel on the same passport. All four boarded the aircraft and during the flight to London (via Dubai) Mr. Kanesrajah took the passport back.

The three persons on disembarkation claimed political asylum. They were not asked to produce passports and they did not claim that they or any of them were the persons named in the passport. On arrest Mr. Kanesrajah was found to be in possession of his wife's passport (as forged) and the travel documents issued to the three other travellers. On conviction by a jury he was sentenced to fifteen months' imprisonment.

The Court of Appeal following the decision of your Lordships' House in *Reg. v. Secretary of State for the Home Department, Ex parte Khawaja* [1984] AC 74 held that since there had been no attempt in either case by the other travellers to use forged passports, they could not have been illegal entrants. It was not suggested that the travellers had practised any deception and evidently they had not attempted to enter clandestinely. Accordingly the Court of Appeal held that neither respondent could have facilitated the illegal entry of the persons concerned.

In view of the arguments which have been advanced it is necessary to refer to some of the provisions of the Immigration Act 1971, as amended by s. 39(6) of and paragraph 2 of Schedule 4 to the British Nationality Act 1981, and of the Immigration Rules. The Act provides:

> 3(1) Except as otherwise provided by or under this Act, where a person is not a British citizen -
>
> (a) he shall not enter the United Kingdom unless given leave to do so in accordance with this Act; ...
>
> (2) The Secretary of State shall ... lay before Parliament statements of the rules, or of any changes in the rules, laid down by him as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter, ...
>
> 4(1) The power under this Act to give or refuse leave to enter the United Kingdom shall be exercised by immigration officers, ...
>
> (2) The provisions of Schedule 2 of this Act shall have effect with respect to ... :
>
> (b) the examination of persons arriving in or leaving the United Kingdom by ship or aircraft, ... and
>
> (c) the exercise by immigration officers of their powers in relation to entry into the United Kingdom, ...
>
> 11(1) A person arriving in the United Kingdom by ship or aircraft shall for purposes of this Act be deemed not to enter the United Kingdom unless and until he disembarks, and on disembarkation at a port shall further be deemed not to enter the United Kingdom so long as he remains in such area (if any) at the port as

may be approved for this purpose by an immigration officer; and a person who has not otherwise entered the United Kingdom shall be deemed not to do so as long as he is detained, or temporarily admitted or released while liable to detention, under the powers conferred by Schedule 2 to this Act.

...

33(1) For purposes of this Act, except in so far as the context otherwise requires - ...

'entrant' means a person entering or seeking to enter the United Kingdom, and 'illegal entrant' means a person unlawfully entering or seeking to enter in breach of a deportation order or of the immigration laws, and includes also a person who has so entered; ...

By Schedule 2:

2(1) An immigration officer may examine any persons who have arrived in the United Kingdom by ship or aircraft (including transit passengers, members of the crew and others not seeking to enter the United Kingdom) for the purpose of determining - ...

(b) whether, if he is not [a patrial], he may or may not enter the United Kingdom without leave;

4(2) A person on his examination under paragraph 2 or 3 above by an immigration officer shall, if so required by the immigration officer -

(a) produce either a valid passport with photograph or some other document satisfactorily establishing his identity and nationality or citizenship; ...

By the "Statement of Changes in Immigration Rules" (H.C. 251) made under s. 3(2) of the Act of 1971 with effect from 1 May 1990:

7. A person must, on arrival in the United Kingdom, produce on request by the immigration officer a valid national passport or other document satisfactorily establishing his identity and nationality. Everyone arriving in the United Kingdom is liable to be examined and must furnish the immigration officer with such information as may be required for the purpose of deciding whether he requires leave to enter and, if so, whether and on what terms leave should be given.

Passengers in transit

13. Detailed examination of a passenger whose sole purpose is transit to a country outside the common travel area is unlikely to be required once he has satisfied the immigration officer that he has both the means and the intention of proceeding at once to another country and is assured of entry there. If the immigration officer is not so satisfied, leave to enter is to be refused.

Refugees

21. Where a person is a refugee full account is to be taken of the provisions of the Convention and Protocol relating to the Status of Refugees (Cmnd 9171 and Cmnd 3096). Nothing in these rules is to be construed as requiring action contrary to the United Kingdom's obligations under these instruments.

75. Special considerations apply where a person seeking entry claims asylum in the United Kingdom, or where it appears to the immigration officer as a result of information given by that person that he may be eligible for asylum in the United Kingdom. Every such case is to be referred by the immigration officer to the Home Office for decision regardless of any grounds set out in any provision of these rules which may appear to justify refusal of leave to enter. The Home Office will then consider the case in accordance with the provisions of the Convention and Protocol relating to the Status of Refugees ...

The appellants' case is essentially that a person can only be a legal entrant to the United Kingdom if he has a passport or other relevant document. Any person who enters or who seeks to enter the United Kingdom without a passport is an illegal entrant. This, it is said, applies no less to those seeking asylum. If they have a passport and seek to enter asking for political asylum they are legal entrants; if they do not have a passport they are illegal entrants; there is no third status of "asylum seekers". Even if as illegal entrants they may be allowed to stay under the special provisions set out in Immigration Rules and the Geneva Convention 1951 as amended by the Protocol of 1967, that does not prevent a person from committing an offence under s. 25 of the Act of 1971 if he makes or carries out arrangements for securing or facilitating their entry into the United

Kingdom when he knows or has reasonable cause for believing that they are illegal entrants because they have no passports.

It seems to me that when a prosecution is brought under s. 25 of the Act of 1971 the first question is whether the persons concerned are "illegal entrants"; the second is whether the accused knew or had reasonable cause for believing them to be such; and the third whether the defendant was knowingly concerned in making or carrying out arrangements for securing or facilitating their entry into the United Kingdom.

As to the first question s. 3 of the Act draws a distinction between **arrival** and **entry**. Thus a person shall not **enter** without leave and the power to give leave to **enter** is vested in immigration officers who may examine persons **arriving** in the United Kingdom. By s. 11 a person has not entered whilst he is in a place approved for the purposes (semble) of awaiting examination and being examined. Nor has he **entered** when he is temporarily admitted under powers conferred by Schedule 2 to the Act.

By paragraph 2 of the Schedule a person who has **arrived**, including transit passengers and persons not seeking to **enter**, may be exami-ned so that the immigration officer may determine whether such person may or may not **enter** the United Kingdom without leave.

The pattern of the Act is thus that a person arriving in the United Kingdom by air must present himself to an immigration officer, and if so required, be examined, furnish information and produce a valid passport or other document. He can only enter lawfully if he is given leave. He is an illegal entrant if he comes in without such leave or in breach of the immigration laws, e.g. by deceiving the immigration officer knowingly or otherwise.

A person arriving by air at Heathrow does not enter the United Kingdom when he disembarks. Nor, contrary to the appellant's argument, has he **entered** when he proceeds towards immigration control having passed the transit corridor, thereby evincing an intention to go through immigration rather than to seek to go to a foreign destination. It follows that merely to disembark without a passport does not mean that a person has *ipso facto* entered illegally.

It is said however that "illegal entrant" includes a person seeking to enter in breach of the immigration laws. However, a person in my opinion is not seeking to enter within the meaning of the Act when he disembarks. He seeks to enter when he presents himself to the immigration officer or when he tries to pass out of the area of immigration control without presenting himself to the immigration officer. Thus if he presents himself to the immigration officer and produces a forged passport or lies in a material way he is seeking to enter in breach of the immigration laws. If he is discovered to have forged documents he is an "illegal entrant" within the definition set out in the Act. If he succeeds and is allowed in on the basis of forged documents he is also an "illegal entrant".

On the other hand if he presents himself to an immigration officer and asks for political asylum and does not produce a forged document or otherwise seek to deceive or deceive the immigration officer he is not a person entering or seeking to enter in breach of the immigration laws.

He may not succeed in getting political asylum; even after temporary admission he may be refused leave. But he is not an illegal entrant for the purposes of the Act since he has not entered or sought to enter in breach of the immigration laws whether or not he has a passport.

The same is true of a person who on arrival openly goes to the immigration officer and says that he has mislaid his passport and asks whether he can establish his identity in any way without the appropriate document. He may be refused and returned from whence he came. He is not at that stage, in my view, an illegal entrant. He has not entered or sought to enter in breach of the immigration laws. The test of the legality of his entry is whether leave has been lawfully obtained and not whether a valid passport or other relevant document is in his possession.

The critical feature of the present case is that none of the travellers sought to rely on false documents nor did they themselves practise any fraud or deception on the immigration officers nor did they enter clandestinely. They were not charged with any of the offences of knowingly entering without leave under s. 24

of the Act or of refusing or failing to be examined or producing documents or making false statements or having in their possession any passport which they knew or had reasonable cause to believe to be false within the meaning of s. 26 of the Act. The fact that they used forged documents to leave another country (without which, as Sir John Donaldson, MR, pointed out in *Nadarajah Vilvarajah v. Secretary of State for the Home Department* [1990] Imm. AR 457, 459-460, they might not have got out of that country) does not mean automatically that they practised deception to come into the United Kingdom. Here they all declared at once that they were seeking political asylum and they did not seek in any way to rely on the forged passports which in any event they no longer had in their possession. However it must be stressed that in relation to a charge of facilitating illegal entry under s. 25 of the Act of 1971 the position of a defendant may be very different in a case where the person in reality seeking asylum either (a) relies only on forged documents or (b) relies initially on forged documents but when the falsity is revealed or the authenticity of the documents challenged, changes tack and seeks to claim political asylum.

However desirable it may be to stop the trafficking in people and documents for the purpose of seeking entry into the United Kingdom, in the present case the Court of Appeal came quite clearly to the correct conclusion and I would dismiss both appeals.

Lord Woolf

My Lords,

I have read the speech of my noble and learned friend, Lord Slynn of Hadley. For the reasons which he gives, I too would dismiss both appeals.